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THE PHOENIX INSURANCE COMPANY and
THE TRAVELERS INDEMNITY COMPANY

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

THE PHOENIX INSURANCE
COMPANY, a Connecticut
corporation; and THE TRAVELERS
INDEMNITY COMPANY, a
Connecticut corporation,

Plaintiffs,

v.

INFINITY CONTACT, INC., an Iowa
corporation; and NUANCE
COMMUNICATIONS, INC., a
Delaware corporation,

Defendants

CASE NO. 5:13-cv-5905

COMPLAINT FOR
DECLARATORY RELIEF;

DEMAND FOR JURY

Plaintiffs The Phoenix Insurance Company (“Phoenix”) and The Travelers Indemnity Company (“Travelers Indemnity”) (collectively “Travelers”) hereby make their Complaint against defendants Infinity Contact, Inc. (“Infinity”) and Nuance Communications, Inc. (“Nuance”) (collectively “Defendants”) and allege as follows:

I. NATURE OF ACTION

1. This is an insurance coverage action seeking declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Travelers seeks a determination that it has no duty to defend or indemnify Defendants under certain insurance policies issued by Phoenix and Travelers Indemnity to Infinity (“Travelers Policies”) with respect to the Underlying Lawsuit

1 identified in this Complaint, which asserts claims against Defendants for alleged violations
2 of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”).

3 **II. PARTIES**

4 2. Plaintiff The Phoenix Insurance Company is an insurance company
5 organized and existing under the laws of the State of Connecticut, with its principal place
6 of business in Hartford, Connecticut.

7 3. Plaintiff The Travelers Indemnity Company is an insurance company
8 organized and existing under the laws of the State of Connecticut, with its principal place
9 of business in Hartford, Connecticut.

10 4. Defendant Infinity Contact, Inc. is a corporation organized and existing
11 under the laws of the State of Iowa with its principal place of business in Cedar Rapids,
12 Iowa.

13 5. Defendant Nuance Communications, Inc. is a corporation organized and
14 existing under the laws of the State of Delaware with its principal place of business in
15 Sunnyvale, California.

16 **III. JURISDICTION AND VENUE**

17 6. This declaratory judgment action is brought pursuant to 28 U.S.C. §§ 2201
18 and 2202, and Rule 57 of the Federal Rules of Civil Procedure.

19 7. An actual justiciable controversy exists between Travelers and Defendants
20 within the meaning of 28 U.S.C. § 2201 regarding whether Travelers has a duty to defend
21 and indemnify Defendants under the Travelers Policies, as more particularly described
22 below.

23 8. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1)
24 because the amount in controversy exceeds the sum or value of \$75,000.00, exclusive of
25 interest and costs, and the suit is between citizens of different states.

26 9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) in that a
27 substantial part of the events or omissions giving rise to this claim occurred in this judicial
28 district, in that Defendant Nuance maintains a primary corporate office in this judicial

1 district and the Underlying Lawsuit was filed in this judicial district.

2 **IV. UNDERLYING LAWSUIT**

3 10. This action addresses insurance coverage for a purported class action lawsuit
4 brought against Defendants alleging violations of the Telephone Consumer Protection Act,
5 47 U.S.C. § 227, *et seq.* (“TCPA”) (“Underlying Lawsuit”).

6 11. The First Amended Complaint in the Underlying Lawsuit (“Complaint”) was
7 filed on October 20, 2013 in this Court and is entitled *William Hopwood and Teresa*
8 *Martinez, individually and on behalf of all others similarly situated v. Nuance*
9 *Communications, Inc. and Infinity Contact, Inc.*, U.S.D.C. (N.D. Cal.) Case No. CV-13-
10 2132-YGR. A true and correct copy of the First Amended Complaint in the Underlying
11 Lawsuit is attached as Exhibit A to this complaint.

12 12. The Complaint alleges that Infinity, a telemarketing company, initiated
13 telemarketing telephone calls on behalf of and at the direction of its client Nuance to the
14 plaintiffs in the Underlying Lawsuit.

15 13. The Complaint further alleges that Nuance provided Infinity with the
16 telemarketing scripts, product information, and directions on who to call and how to
17 interact with them.

18 14. The Complaint further alleges that the telemarketing telephone calls were
19 placed between 2011 and 2013; that they were placed without the express or implied
20 consent of the underlying plaintiffs; and that they were placed to telephone numbers listed
21 on the National Do Not Call Registry.

22 15. The Complaint further alleges that Defendants’ conduct violated the TCPA.

23 16. Infinity seeks defense and indemnification under the Travelers Policies
24 against the claims in the Underlying Lawsuit.

25 17. Nuance seeks a defense against the claims in the Underlying Lawsuit, on the
26 alleged basis that it is Infinity’s indemnitee entitled to a defense under the Supplementary
27 Payments provision in the Travelers Policies

28

1 **V. THE INSURANCE CONTRACTS**

2 18. The Phoenix Insurance Company issued to Infinity policy no. I-680-
3 6078N848-TCT-09 for policy period 6/15/09 - 6/15/10. The coverage includes
4 Commercial General Liability Protection subject to a \$1,000,000 “per occurrence” limit of
5 insurance. The policy was renewed for annual consecutive policy periods from 6/15/10 -
6 6/15/11, 6/15/11 - 6/15/12, 6/15/12 - 6/15/13, and 6/15/13 - 6/15/14 (the “Phoenix Primary
7 Policies”).

8 19. The Travelers Indemnity Company issued to Infinity Umbrella Excess policy
9 no. ISF-CUP-6514N718-IND-09 for policy period 6/15/09 - 6/15/10. The coverage
10 includes Umbrella Excess coverage subject to a \$4,000,000 “bodily injury and property
11 damage” limit of insurance. The policy was renewed for annual consecutive policy
12 periods from 6/15/10 - 6/15/11, 6/15/11 - 6/15/12, 6/15/12 - 6/15/13, and 6/15/13 - 6/15/14
13 (the “Travelers Indemnity Umbrella Excess Policies”).

14 20. The terms in the Travelers Indemnity Umbrella Excess Policies are identical,
15 in pertinent part, to the terms in the Phoenix Primary Policies. Both sets of policies are
16 collectively referred to herein as the “Travelers Policies.”

17 21. As specified in the Travelers Policies, and as set out in detail below, the
18 coverage provided is limited, and is subject to certain definitions, scope and date
19 restrictions, insuring agreements, retained and aggregate policy limits, and exclusions.

20 22. Coverage A in the Phoenix Primary Policies, “Bodily Injury and Property
21 Damage Liability”, provides:

22 **SECTION I — COVERAGES**

23 **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE**
24 **LIABILITY**

25 **1. Insuring Agreement**

26 a. We will pay those sums that the insured becomes legally
27 obligated to pay as damages because of “bodily injury” or “property
28 damage” to which this insurance applies. We will have the right and duty

1 to defend the insured against any “suit” seeking those damages. However,
 2 we will have no duty to defend the insured against any “suit” seeking
 3 damages for “bodily injury” or “property damage” to which this
 4 insurance does not apply. We may, at our discretion, investigate any
 5 “occurrence” and settle any claim or “suit” that may result.

6 * * *

7 b. This insurance applies to “bodily injury” and “property
 8 damage” only if:

9 (1)The “bodily injury” or “property damage” is caused by an “occurrence”
 10 that takes place in the “coverage territory”;

11 (2)The “bodily injury” or “property damage” occurs during the policy
 12 period;

13 23. The Phoenix Primary Policies contain the following definitions relevant to
 14 Coverage A:

15 SECTION V — DEFINITIONS

16 * * *

17 “Bodily injury” means bodily injury, mental anguish, mental injury, shock,
 18 fright, disability, humiliation, sickness or disease sustained by a person,
 19 including death resulting from any of these at any time.

20 * * *

21 “Occurrence” means an accident, including continuous or repeated exposure
 22 to substantially the same general harmful conditions.

23 “Property damage” means:

24 a. Physical injury to tangible property, including all resulting loss
 25 of use of that property. All such loss of use shall be deemed to occur at the
 26 time of the physical injury that caused it; or

27 b. Loss of use of tangible property that is not physically injured. All such
 28 loss of use shall be deemed to occur at the time of the “occurrence” that

1 caused it.

2 “Property damage” does not include loss of or damage to “electronic media
3 and records”.

4 As used in this definition, “electronic media and records” means:

- 5 a. Electronic data processing, recording or storage media such as
6 films, tapes, discs, drums or cells;
- 7 b. Data stored on such media; or
- 8 c. Programming records for electronic data processing or
9 electronically controlled equipment.

10 “Bodily injury” means bodily injury, sickness or disease sustained by a
11 person, including death resulting from any of these at any time.

12 “Occurrence” means an accident, including continuous or repeated exposure
13 to substantially the same general harmful conditions.

14 “Property damage” means:

- 15 a. Physical injury to tangible property, including all resulting loss
16 of use of that property. All such loss of use shall be deemed to occur at the
17 time of the physical injury that caused it; or
- 18 b. Loss of use of tangible property that is not physically injured.
19 All such loss of use shall be deemed to occur at the time of the “occurrence”
20 that caused it.

21 24. The Phoenix Primary Policies also contain the following pertinent exclusion
22 applicable to Coverage A:

- 23 a. Expected or Intended Injury
24 “Bodily injury” or “property damage” expected or intended from the
25 standpoint of the insured. This exclusion does not apply to “bodily
26 injury” resulting from the use of reasonable force to protect persons or
27 property.

25. The 2012-2013 and 2013-2014 Phoenix Primary Policies include the following endorsement applicable to Coverage A, which reads in relevant part as follows:

EXCLUSION — UNSOLICITED COMMUNICATIONS

* * *

This insurance does not apply to “bodily injury”, “property damage”, “personal injury”, “advertising injury” or “website injury” arising out of unsolicited communications by or on behalf of any insured. Unsolicited communications means any form of communication, including but not limited to facsimile, electronic mail, posted mail or telephone, in which the recipient has not specifically requested the communication. Unsolicited communications also include but are not limited to communications which are made or allegedly made in violation of the Telephone Consumer Protection Act and any amendments, and/or local or state statutes that bar, prohibit or penalize such communications.

26. The Phoenix Primary Policies contain the following Supplementary Payments provision, which reads in pertinent part as follows:

SUPPLEMENTARY PAYMENTS — COVERAGES A AND B

* * *

2. If we defend an insured against a “suit” and an indemnitee of the insured is also named as a party to the “suit”, we will defend that indemnitee if all of the following conditions are met:

- a. The “suit” against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an “insured contract”;
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same “insured contract”;

1
2 d. The allegations in the “suit” and the information we know
3 about the “occurrence” are such that no conflict appears to exist
4 between the interests of the insured and the interests of the
5 indemnitee;

6 e. The indemnitee and the insured ask us to conduct and control
7 the defense of that indemnitee against such “suit” and agree that we
8 can assign the same counsel to defend the insured and the indemnitee;
9 and

10 f. The indemnitee:

11 (1) Agrees in writing to:

12 (a) Cooperate with us in the investigation, settlement
13 or defense of the “suit”;

14 (b) Immediately send us copies of any demands,
15 notices, summonses or legal papers received in
16 connection with the “suit”;

17 (c) Notify any other insurer whose coverage is
18 available to the indemnitee; and

19 (d) Cooperate with us with respect to coordinating
20 other applicable insurance available to the
21 indemnitee; and

22 (2) Provides us with written authorization to: (a) Obtain
23 records and other information related to the “suit”; and

24 (b) Conduct and control the defense of the indemnitee in such
25 “suit”.
26
27
28

CAUSE OF ACTION FOR
DECLARATORY JUDGMENT
(Against All Defendants)

27. Travelers hereby incorporates and re-alleges the allegations in paragraphs 1-26 as if fully set forth here.

28. There exists a genuine and bona fide dispute, and an actual controversy and disagreement between Travelers and Defendants with regard to whether Travelers has a duty to defend and/or indemnify Defendants in the Underlying Lawsuit.

29. Pursuant to the Uniform Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, Travelers in good faith request that the Court declare the following:

- a. That there is no duty to defend or indemnify Infinity under the Bodily Injury coverage because there is no alleged “bodily injury”.
- b. That there is no duty to defend or indemnify Infinity under the Property Damage coverage because there is no alleged “property damage”.
- c. That there is no duty to defend or indemnify Infinity under the Bodily Injury or Property Damage coverage because there is no alleged “occurrence”.
- d. That there is no duty to defend or indemnify Infinity under the Bodily Injury or Property Damage coverage because coverage is excluded by the Expected or Intended Injury exclusion.
- e. That there is no duty to defend or indemnify Infinity under the 2012 – 2013 and 2013 – 2014 Travelers Policies because coverage is excluded by the Unsolicited Communications exclusion.
- f. That there is no duty to defend or indemnify Infinity under any policy issued during any policy period in which Infinity did not allegedly or actually violate the TCPA.
- g. That there is no duty to defend Nuance for the reasons set forth in Paragraphs a. through f. above with respect to Infinity

Plaintiffs demand a trial by jury of all issues triable by jury.

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